NATIONAL INSURANCE CO. LTD

v.

ABDUL HAFIDZ HJ. A. RAHMAN & ANOR.

FEDERAL COURT, JOHOR BAHRU
SALLEH ABAS CJ (MALAYA)
WAN SULEIMAN FJ
GEORGE SEAH FJ
[CIVIL APPEAL NO. 170 OF 1981]
14 APRIL 1983

INSURANCE: *Motorcar in accident driven by person not owner - Whether insurers of car or of driver at risk - Sections 75(1)(b), 80(1), Road Traffic Ordinance 1958 - Meaning of "insurers", "any person insured" - Relevance of proviso qualifying policy - Failure to give statutory notice.*

The plaintiffs, who were injured in a road traffic accident by a motorcar driven by one Ko obtained an interlocutory judgment against him but as he did not pay the judgment sum, they sued the defendants under s. 80(1) of the Road Traffic Ordinance 1958 ("the Ordinance"). The second defendants were the insurers of the car, which was not owned by Ko but by another person. The policy included an undertaking to indemnify any authorised driver who was driving the car provided that he was not entitled to indemnify under any other policy. The 1st defendants were the insurers of Ko's car. The policy included an undertaking to indemnify Ko whilst personally driving a private car not belonging to him. At the trial the parties agreed on a statement of facts and invited the Judge to give his decision on the basis of those facts. The trial Judge held the 1st defendants to be liable to satisfy the judgment as their policy was the one which was at risk.

Held:

[1] he case was purely a matter of construction of s. 80(1) of the Ordinance, by which provision the plaintiffs have a compulsorily insurable claim.

[2] The question of delivery of certificates of insurance was not an issue to the case and it could be assumed that each of the defendants had delivered their certificate to their respective insured, thus rendering both the policies effective for the purpose of the Ordinance.

[3] It was the policy with the second defendants which was at risk. They were the "insurers" within the meaning of s. 80(1), who had undertaken to indemnify their insured against such liability as is required to be covered under s. 75(1)(b) of the Ordinance, as the injuries arose and the liability incurred out of the use of the car insured by them. The decisive factor which is the subject matter of any motorcar insurance is the specified motorcar. [Section 74 of the Ordinance; *Tattersall v. Drysdale* [1935] 2 KB 174, 175].

[4] Though the question of whether Ko was an authorised driver was never pleaded, it was clear from the agreed statement of facts and the parties' submissions and their pleadings that their understanding was that Ko was an "authorised driver". As such he came within the meaning of "any person insured" referred to in s. 80(1) of the Ordinance and the 2nd defendants "the insurer" within the meaning of the same provision.

[5] The proviso qualifying the policy issued by the second defendants must be ignored. The whole clause relating to an authorised driver was a contractual matter between the 2nd defendants and their insured, whilst the liability to satisfy the judgment was statutory and

must prevail over any contractual stipulations. The matter was made clear by s. 80(1) itself. The proviso was not a relevant issue in a suit between the injured third parties and the insurers. It would have been relevant for example, if Ko had paid the plaintiffs and was suing the 2nd defendants for an indemnity. [*Austin v. Zurich General Accident & Liability Insurance Co. Ltd.* [1945] 1 KB 250].

[6] The 2nd defendants should not be allowed to raise the question of failure on the part of the plaintiffs to give notice of commencement of proceedings as required under s. 80(2)(a) of the Ordinance. That defence was abandoned by them at the trial, the parties having agreed to submit for the Court's ruling certain agreed issues, not including that of notice, without calling any evidence.

[Appeal allowed.]

Cases referred to:
Tattersall v. Drysdale [1935] 2 KB 174
Austin v. Zurich General Accident and Liability Insurance Co. Ltd., [1945] 1 KB 250

Legislation referred to:
Road Traffic Act 1934 [UK], s. 10
Road Traffic Act 1960 [UK], s. 207
Road Traffic Act 1972 [UK], s. 149
Road Traffic Ordinance 1958, ss. 74, 75(1)(b), 75(3), (4), 80, (1), (2)(a)
Third Parties (Rights against Insurers) Act 1930 [UK], s. 1

For the appellants - P. Devadas; M/s. Devadas & Co.
For the 1st & 2nd respondents - K.C. Koh; M/s. K.C. Koh & Co.
For the 2nd defendants - B.T. Lee; M/s. Leong Wai Yin & Co.

JUDGMENT

Salleh Abas CJ (Malaya):

The plaintiffs were injured in a road traffic accident by a motorcar JF 5143 driven by one Ko Beng Lai. They sued Ko and subsequently obtained an interlocutory judgment against him which was later assessed at RM44,098. Ko did not pay the judgment sum and, after obtaining no response from the defendants who were insurers in respect of the use of the aforesaid motorcar by Ko, the plaintiffs availing themselves of s. 80 of the Road Traffic Ordinance, 1958 (FM 49 of 1958), (the Ordinance), sued both of them. Although both the defendants agreed that the plaintiffs were entitled to have their judgment satisfied under s. 80, each is denying liability and claiming the other to be liable therefor.

Motorcar JF 5143 which was driven by Ko and caused injuries to the plaintiffs was not owned by Ko, but by one Kwang Shi Ching who insured it with the second defendants. Under this policy the second defendants undertook to indemnify the insured (Kwang Shi Ching) in the event of accident caused by or arising out of the use of this car against all sums which he (the insured) shall become legally liable to pay in respect of death or bodily injuries caused to any person. The policy also contained the usual extension clause relating to an authorized driver in that the second defendants undertook to indemnify any authorized driver who was driving the car provided that he was not entitled to indemnify under any other policy. (See **s. II, Clause 2(a)(ii) of the second defendants' policy at p. 53 of the Record**). In the context of this policy Ko, not being the owner of motorcar JF 5143, was at the most an authorized driver; the term "authorized driver" not being defined by the policy, to mean any person driving the insured vehicle with the permission of the insured or the policy holder.

However, Ko was also covered by a policy issued by the first defendants in respect of his own motorcar, which was registered as JE 8143. Under this policy the first defendants in addition to undertaking to indemnify Ko in respect of the use of his own motorcar by himself or by an authorized driver also undertook to indemnify him whilst personally driving a private motorcar not belonging to him. (See **s. II, Clause 2(b) of the first defendants' policy at p. 55 of the Record**). Thus because Ko was covered by the first defendants' policy in respect of his own motorcar with an extension of cover in respect of any other motorcar, the second defendants averred in their statement of defence that their policy did not cover Ko and that they were therefore not liable under s. 80 of the Road Traffic Ordinance to satisfy the plaintiffs' judgment. They also contended that the failure of the plaintiffs to give them a notice of the commencement of the proceedings against Ko as required under subsection (2)(a) of s. 80 of the Ordinance absolved them from the obligation to satisfy the judgment and that the first defendants, being the insurer of Ko, must be the one who should satisfy the judgment.

The first defendants on the other hand averred in their statement of defence that they were under no obligation to satisfy the adjuged sum because (i) Ko did not notify them of the occurence of the accident as required by condition 4 of the policy and liability thereunder was thereby repudiated; and (ii) because their liability for Ko is not a liability in respect of which the plaintiffs' judgment was obtained as it is not such a liability as is required to be covered by a policy under s. 75(1)(b) of the Ordinance.

At the trial before the learned trial Judge the plaintiffs and both the defendants agreed on a statement of facts and invited the learned Judge to give his decision on the basis of these facts. He accordingly held that the first defendants were liable to satisfy the judgment as their policy was the one which was on risk. Hence this appeal.

In this appeal Counsel for the first defendants strenously argued that it was the policy of the second defendants which was on risk, and not his client's and as such the second defendants were "the insurer" who must comply with s. 80 of the Ordinance.

An insurance policy is essentially a contract of indemnity between the insured (policy holder) and his insurer. In the absence of any statutory provisions, no person who is not a party to the contract, though entitled to the benefits under it can obtain such benefits directly from the insurer. In England the first inroad into this common law principle of privity of contract was made by the Third Parties (Rights against Insurers) Act, 1930. Under s. 1 of the Act in certain circumstances the insured's right against his insurer was transferred to the third party, to whom the liability insured under the policy was incurred. It was against this background that the Road Traffic Act 1930 replaced by a series of Acts until the present Road Traffic Act 1972 was passed. The provisions relating to compulsory insurance against third party risk contained in our Road Traffic Ordinance are modelled on the corresponding provisions in the English Road Traffic Acts. Section 80 of our Ordinance which forms the basis of the plaintiffs' suit in this case is in *pari materia* with s. 149 of the English 1972 Act, which itself is a re-enactment of s. 207 of the 1960 Act and s. 10 of the 1934 Act.

This case is purely a matter of construction of s. 80(1) of our Road Traffic Ordinance, which is as follows:

> 80. (1) If, after a certificate of insurance has been delivered under subsection (4) of s. 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of subsection (1) of s. 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to

> avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

Without this provision the plaintiffs can have no direct right of action against the defendants in respect of the bodily injuries caused to them arising out of the use of the motorcar JF 5143. By virtue of this provision the plaintiffs have a compulsorily insurable claim. But against whom? In view of the double insurance and the disclaimer by each of the defendants, the issue which the Court must determine is this: Who, in the circumstances of this case, is the "insurer" within the meaning of that provision to satisfy the compulsorily insurable claim?

Section 80(1) of the Ordinance with its complex sentence is by no means an easy section to construe. But it is clear from it that the insurer liable to satisfy the judgment under the section must be the one who -

(1) have delivered a certificate of insurance under sub-section (4) of s. 75;

(2) has undertaken to indemnify his insured against such liability as is required to be covered under para. (b) of sub-section (1) of s. 75 (being a liability covered by the terms of the policy); and

(3) the judgment it has to satisfy is one which is given against any person insured by the policy.

The agreed statement of facts is silent on the question of delivery of certificates of insurance. Since this is not an issue to this case, we assume that each of the defendants has delivered their certificate of insurance to their respective insured, thus rendering both the policies effective for the purpose of the Ordinance. However, up to this point we cannot just yet determine which of the two defendants is the "insurer" within the meaning of s. 80(1) of the Ordinance.

We must now consider condition (2) above. The liability to be covered under s. 75(1)(b) of the Ordinance is, to quote the words of the section -

> any liability which may be incurred by him or them (i.e. person or persons or classes of persons specified in the policy) in respect of the death of or bodily injury to any person **caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road**.
>
> (the bracketed words and emphasis are ours)

The injuries suffered by the plaintiffs were not caused by Ko's own motorcar JE 8143 but by motorcar JF 5143. It is arising out of the use of the latter motorcar that the injuries to the plaintiffs were caused. As this car was insured with the second defendants, it is their policy which was on risk and likewise as the judgment to be satisfied is one in respect of liability which arose out of the use of the said motorcar JF 5143, it is the second defendants who must be "the insurer" within the meaning of s. 80(1) of the Ordinance. This fact excludes the applicability of the first defendants as "the insurer". Even if we look at the policies, the system adopted by any insurance company with respect to motorcar insurance is that the company insures a particular car protecting its owner and its authorized driver in case of injuries to a third party; the premium being calculated partly on value and partly on engine capacity. The decisive factor which is the subject matter of the insurance is the specified motorcar. It is because of the use of the motorcar that an insurance is required. [Section 74 of the Ordinance and see *Tattersall v. Drysdale* [1935] 2 KB 174].

The expression "any person insured" used in s. 80(1) of the Ordinance has a wider meaning than the words "the insured" used in the policies. "The insured" refers only to the policy holder, whilst "any person insured" does not only refer to the policy holder, or the insured but also extends to any authorized driver. The question whether Ko was an authorized driver and therefore insured by the second defendants' policy was never pleaded, nor was it in issue in the Court below. Even before us it was only raised in passing. What the second defendants contended in the Court below was that their policy was not on risk because Ko was covered by the first defendants' policy and as such they were not liable under s. 80 of the Ordinance to satisfy the judgment. It was at the prompting of their Counsel's submission that the learned trial Judge in fact defined in his judgment the issues which he was called upon to decide. These are whether -

(a) the policy of the first or the second defendants was on risk at the material time of the accident; and

(b) whichever defendants found to be liable could they call for rateable contribution from the other defendants.

(See p. 45 of the Appeal Record)

Thus it is clear from the agreed statement of facts and the parties' submissions on these facts and their pleadings that their understanding was that Ko was an authorized driver. That being the case, Ko must be "a person insured by the" second defendants' policy, and as such the second defendants must be "the insurer" within the meaning of s. 80 of the Ordinance to satisfy the plaintiffs' judgment.

The policy issued by the second defendants in respect of an authorized driver is qualified by a proviso to the effect that the second defendants would not be liable to indemnify such a driver if he is entitled to an indemnity under any other policy. Can they now rely upon this proviso? What effect the proviso has upon the construction of s. 80(1) of the Ordinance? In other words, is Ko still "a person insured" by the second defendants' policy within the meaning of that section, despite the fact that according to the policy the second defendants would not indemnify him because of his cover by the first defendants? In our view for the purpose of s. 80, this proviso has to be ignored. The proviso and indeed the whole clause relating to an authorized driver is a contractual matter between the second defendants and their insured, the owner of motorcar JF 5143, whilst the liability to satisfy the judgment is statutory and therefore must prevail over any contractual stipulations. The matter is made clear by s. 80(1) itself which provides that the insurer shall pay the person entitled to the benefit of the judgment "notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy."

A great deal of confusion seems to creep into the case because of the failure to appreciate the difference between the statutory obligation of an insurer under s. 80(1) to satisfy a judgment given against a person insured by its policy on the one hand and the insurer's contractual obligation to indemnify its insured and/or his authorized driver on the other. If Ko had paid the plaintiffs and thereafter sued the second defendants under s. 75(3) of the Ordinance for an indemnity of the sum he had so paid the proviso may well be a relevant issue. [See *Austin v. Zurich General Accident & Liability Insurance Co. Ltd.* [1945] 1 KB 250]. Almost every authority cited to us in this appeal deals with the question of contributions and indemnity between insurers and their insured and authorized drivers. None is on the question of liability to satisfy judgment obtained by a third party. Similarly, if the second defendants having paid the plaintiffs were to sue Ko for the recovery of the sum so paid or

sue the first defendants for a rateable contribution of the said sum, the proviso is equally important. And if it is held that Ko was not covered by the second defendants' policy, he is entitled to turn to the first defendants, who under their policy covered him whilst even driving a motorcar belonging to another person. But all these issues are issues which are relevant only as between the insurers and the insured and authorized drivers. They are not relevant in a suit between the injured third parties and the insurers. In such a suit the expression in s. 80(1) of the Ordinance saying "notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy" renders such issues irrelevant.

The plaintiffs' right to the satisfaction of the judgment by the second defendants is not absolute as it is expressly stated in s. 80(1) of the Ordinance to be "subject to the provisions of this section". One of the provisions relied upon by the second defendants in their statement of defence is subsection (2)(a). Under this subsection the second defendants would not be liable to pay the judgment sum "unless before or within seven days after the commencement of the proceedings in which the judgment was given **the insurer (i.e. second defendants) had notice of the proceedings.**" (The bracketed words and emphasis are ours). The second defendants said in the statement of defence that they were under no statutory duty to satisfy the said judgment, "as the plaintiffs had failed to give to the second defendants notice of commencement of proceedings in Civil Suit No. 82 of 1975 as required under s. 80(2)(a) of the Road Traffic Ordinance, 1958 (No. 49 of 1958)". But this defence was abandoned by them at the trial. (See p. 19 of the Appeal Record). The parties simply agreed between themselves to submit for the Court's ruling certain agreed issues without calling evidence. At the risk of repetition Counsel for the second defendants defined the issues to be as follows:

> The issues to be decided by this Honourable Court are as follows:
>
> (a) whether the policy of the first defendants or the second defendants were on risk at the material time of the accident;
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> (b) whichever defendants are found to be liable to satisfy the judgment sum and costs, could they call for contribution from the other for 50 per cent in view of the Condition 7 of the policy of insurance.

Thus we cannot see how the second defendants should be allowed to raise this question again after having abandoned it.

In conclusion, we hold that the plaintiffs' right to the satisfaction of their judgment is not affected by any of the provisions of s. 80 of the Ordinance. We therefore allow the appeal which means that the second defendants must satisfy the plaintiffs' judgment. As to the question of costs, the second defendants must bear the costs of the plaintiffs and the first defendants in the Court below and here. The deposit should be refunded to the first defendants, who have won this appeal.

Also found at [1983] 1 CLJ 285